No. 278

Supreme Court of the United States

OCTOBER TERM 1942

MURRAY R. SPIES,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF PETITIONER

DAVID V. CAHILL,
Attorney for Petitioner.

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The opinion of the Circuit Court of Appeals is not yet reported. It appears at the end of the record; the number of the page is not yet available.

No opinion was rendered by the United States District Court for the Southern District of New York, in which the cause was tried.

Jurisdiction

The jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 State 938, Title 28, U. S. C. A., Sec. 347(a).

Questions Presented

1. Whether the wilful omissions (a) to file a return of income and (b) to pay a tax thereon, defined as misdemeanors in Section 145(a) of the Internal Revenue Law, of themselves, without the addition of any other element, constitute the felony of attempting to defeat and evade the income tax law, defined in Section 145(b) of the same law.

2. Whether the word "attempts" in Section 145(b) is used in its common law significance, meaning positive and affirmative acts, or is intended by Congress in this statute to have a different and peculiar meaning, including not only positive acts, but also the mere omissions defined in Section 145(a).

3. Whether Section 145(b), if construed as intended to give the word "attempts" a meaning different from its meaning at common law, is not unconstitutional for uncertainty or lack of definition.

4. Whether the trial court did not err in failing to instruct the jury as to the effect of petitioner's mental and physical condition on his will power and the wilfulness of his alleged offenses.

Statute Involved

Section 145 of the Revenue Act of May 10, 1934—Penalties.

(a) Any person required under this chapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information for the purposes of the computation, assessment, or collection of any tax imposed by this chapter, who wilfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition

to other penalties provided by law, be guilty of a misdemeanor and, upon conviction by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Any person required under this chapter to collect, account for, and pay over any tax imposed by this title, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) The term "person" as used in this action includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs (May 10, 1934, 11:40 a. m., c. 277, Sec. 145, 48 Stat. 724).

Statement

The indictment consisted of a single count, alleging that the defendant had wilfully attempted to defeat and evade the income tax law with respect to his income for the calendar year 1936. It was conceded at the outset of the trial in the District Court that he had a taxable income of approximately $40,000 for the year 1936 and that there was due as tax upon that income approximately $6,000 (R. 16) and that he had failed to make the required return or to pay the tax (R. 128). Counsel for the Government nevertheless proceeded with its proof and established those facts. It was claimed that the income of petitioner was larger than the amount conceded and that the tax was corre-

spondingly larger. It is contended and will be argued that essentially no more was proved than the failure to report his income and pay the tax due thereon. Petitioner contended in the trial court and in the appellate court below that the evidence showed only the failure to file the return and pay the tax, which are defined as misdemeanors in Section 145(a), but petitioner was not prosecuted for these misdemeanors. The question was raised whether under the circumstances even the delinquency was wilful. Wilfulness is specified in the statute as one of the essential items of the misdemeanors. However, the present cause is concerned only with the prosecution of the felony.

Petitioner was a young lawyer, whose income was derived in the main not from legal practice but largely from fees and commissions earned in the management of investment trusts. The year in question, 1936, was his one year of large income. It was derived from the sale of control of corporations, which sold securities of an investment trust. He had begun his career as an office boy in the office of a distinguished law firm in the City of New York (R. 134). Through the helpful associations formed there he entered the investment trust field and in 1933 he became associate counsel to an investment corporation. From that time until 1936 he acted as counsel and trustee for a number of investment trusts in association with men of distinction and good character (R. 135-136). He sold control of several distributing corporations on June 11, 1936, for the sum of $40,000. There was a written agreement by which the transfer of control was effected and the transaction was completed in the usual manner (R. 16-17, 139). The sole circumstance, which the Government has emphasized, is that Spies received the $40,000 in cash. The procedure by which the cash was obtained has been enveloped in unnecessary confusion by the emphasis laid upon certain details. It is undisputed that at the closing of the transaction Spies wrote his endorsement on a check for $40,000, which was entered to him on behalf of the purchaser. This check has unaccountably disappeared.

Reighley, a Government accountant witness, testified that the entire endorsed check bearing the endorsement of Spies was an exhibit in a proceeding before the Securities and Exchange Commission, but that it never cleared. He did not know where this check was (R. 113). A photostatic copy of the face of the check was in evidence, but there was no copy of the back, containing the endorsement. The Government introduced in evidence another check for $40,000, which did not bear the name of Spies, either as payee or endorser. Spies never saw that check. He asked that the check, which he did see, be cashed, because it was on a New Jersey bank, he was delivering the closing papers at the time, and this was the biggest transaction of his life (R. 142 et seq.). He paid $2,000 to one Eddy by agreement and sent the balance to his home town, Lynbrook, Long Island, and deposited it in an old account of his wife in trust for his minor son, who had the same name as himself. The armored car in which the money was transported was hired by petitioner in his own name (R. 143). The money was later divided into several accounts in order to get the benefit of Government insurance of deposits (R. 143-144). All of the accounts were in the name of Spies, either in his own name or his wife's name in trust for one of their infant sons.

During the year 1936 Spies had very little other income, no more than a few thousand dollars, earned as salary from distributing companies (R. 144). Additional income was attributed to him by the prosecutor, but he testified that the transactions, involving the putative income, in the main represented transfer from one account to another, and in one instance a sum given him by his brother-in-law for investment (R. 145).

Shortly after he received the money petitioner invested $25,000 with the Equitable Life Assurance Society in an annuity in his own name (R. 144). Improvident investments of his 1936 income by the summer of 1937 had involved him in serious loss and by the end of that year had practically wiped out his assets including his recently

acquired fortune (R. 157). In 1936 he had undertaken on his own resources to develop an investment fund program including two corporations. His commitments for this business were contracted in 1936 and for the most part during the year 1937. In order to keep up with the commitments on his new investment he first borrowed $12,500 from the Manufacturers Trust Company with his annuity as security (R. 54-55). Subsequent loans in the year 1937 brought the total borrowed on his policy to the sum of $22,691.50. The annuity policy was sold by the pledgee to pay the indebtedness and the balance remaining out of his annuity as a result of unfortunate investments amounted to $718.98. He had previously bought a home out of the 1936 income for his wife and children in their own names. Foreclosure proceedings were begun on his home, but by borrowed money he managed to save it for the time being and then rented the house (R. 153-154). By the end of December, 1937, the greater part of the one big fee that he had received in his life, $40,000, was completely gone (R. 157). The investment company proposition, which he attempted with his limited means to finance, failed. He then went to work as a stenographer (R. 157).

In the meantime Spies had consulted an accountant named Rosenberg in connection with his return and the payment of his tax for the year 1936. On behalf of petitioner and at his request Rosenberg filed with the Collector of Internal Revenue on March 11, 1937, an application for an extension to file his return. The extension to April 15, 1937, was granted (R. 45). Subsequently on behalf of Spies, Rosenberg again applied for an extension to May 15th and another extension until June 15th was granted (R. 45). The correspondence with respect to these extensions is in evidence as Government's Exhibits 8 to 15.

For several weeks prior to June 15, 1937, and on that day and subsequent thereto Spies was actually confined to bed under the care of two physicians. Apparently on his own initiative and as a matter of routine Rosenberg also filed on or before March 15, 1937, a tentative return for

Spies, which became Government's Exhibit 18 and contained the word "none" in the space allotted for income. The accountant testified that in his practice that explanation was used when it was not known definitely how much income there was or how much tax was due (R. 50). The accountant specifically remembered that Spies told him that he had an income for the year 1936 (R. 150).

There was proof that Spies for some years had suffered from a mental and physical condition, which may have contributed to his default in reporting his income and paying his tax. It is not meant to suggest that there was any total disability. Up to the year 1937 Spies had engaged in various activities relating to the corporations in which he was interested. Some of the activities were of the usual corporate character such as attendance at meetings of directors. Other persons were engaged to handle the affairs of the corporation, such as investment counsel, legal counsel and managers of various operations during this period. Beginning with the year 1931 Spies' applications for life insurance were rejected by seven or eight different companies and this fact resulted in the development of psychoneurosis during the years 1936 and 1937. He consulted from twelve to fifteen physicians. One of them, Dr. Gilman, treated him for a period of years beginning prior to this time and continuing through 1936 and 1937. He found Spies suffering from a physical condition of abnormally rapid heart action, or tachycardia. He also had high blood pressure (R. 191). In February or March, 1937, in one of the life insurance companies' reports, which was brought to Spies' attention, it was suggested that he had a coronary condition (R. 136). As a result of this he feared that he was going to drop dead at any time. When he was about to close the $40,000 transaction in 1936 he called upon Dr. Sharpe to determine whether he was physically capable of going through with the transaction and went through with it only after receiving the doctor's assurance that he could do so (R. 140-141). Petitioner would not go into subways and feared an impulse

to jump out of windows (R. 137). He was reluctant to go into restaurants (R. 138). This condition was acute during the year 1937. There was nothing to indicate that he feigned illness or phobias, or that his condition was conveniently timed. The diagnosis of other doctors was confirmed by St. Stephen P. Jewett, an expert of high standing in the field of psychiatry and neurology (R. 227-233). Apparently the fears with respect to the possible results of his physical condition were unfounded.

There was no fraudulent act or no positive or affirmative act of concealment on the part of petitioner alleged or attempted to be proved. He had made no false report and no false statement.

It appears that the record of financial transactions as recorded on the stubs of check books made largely by petitioner's wife was not complete. This statement applies only to personal transactions. There was no suggestion that the records of the corporations in which petitioner was interested and through which most of his funds passed were not kept accurately and fully. It probably would not be helpful to discuss the calculation of additional income attributed to petitioner by Government investigators. Many of the items of alleged income were arbitrarily concluded to be income without adequate investigation and fair consideration of their nature. In one instance Spies definitely informed the Government accountant that a certain $1,500 deposited was money obtained from his brother-in-law. Without examining the brother-in-law or investigating further the Government agents included the item as "unexplained income". There were many instances in which obvious duplications were included in the calculation of income (R. 103-110, 145, 148-150).

A more detailed explanation of the facts and circumstances would probably not be helpful to the court in deciding the limited questions presented for review.

ARGUMENT

1

The misdemeanors defined in Section 145(a) of the Revenue Act of May 10, 1934, do not constitute the felony defined in Section 145(b), and the evidence offered, tending to prove the commission of the misdemeanors, was not sufficient to establish the felony.

The indictment contained but one count, alleging that petitioner had committed the felony; that is, that he had unlawfully attempted to defeat and evade the income tax imposed by the Revenue Act (R. 4-7). There was no allegation that he had committed the misdemeanors, wilful failure to report his income and wilful failure to pay the tax due on that income. In describing the felony it was alleged that the crime was committed by failing to report his income and failing to pay the tax, but it was not alleged that these omissions were wilful.

At the beginning of the trial the sufficiency of the indictment was challenged upon the theory that it alleged only the commission of the misdemeanors defined in Section 145(a) of the Revenue Act and these did not constitute the felony defined in Section 145(b) (R. 11-13). However, the trial court apparently assumed that, while the misdemeanors, or essential elements of them, were alleged as means of committing the felony, the allegation of the felony went beyond the description of the means and was intended to include any other essential element. The motion to dismiss the indictment was denied (R. 15).

The question of construction of the felony statute remained, and we are now arguing that question.

The Government proved that Spies failed to report his income and failed to pay the tax. There was no proof of wilfulness in these omissions, unless wilfulness is to be assumed from the mere delinquency. The evidence nega-

tived the imputation of wilfulness. Petitioner by applying for two extensions of time to file his return had notified the Collector of Internal Revenue that he was a potential taxpayer. He had suffered for some years from a physical condition, which precluded insurance, and from a resulting psychoneurosis, and he was ill when the second extension of time to file his return expired (R. 152). His funds were being rapidly exhausted by unfortunate investments. There was no issue with respect to these facts. The Government challenged only other cumulative proofs such as the proof that petitioner, in addition to obtaining extensions, had both telephoned and written to the Collector of Internal Revenue, and the proof that his mental condition might have interfered with his orderly and prompt attention to his duty in tax matters and other matters.

However, if it be assumed for the sake of argument that he wilfully failed to report his income and pay his tax, the fundamental question remains, whether these misdemeanors of themselves and without the addition of any other element constitute the felony.

If it be held as a matter of statutory construction that the misdemeanors constitute the felony, the result is that the same act proscribed as a misdemeanor in subdivision (a) of the statute is also a felony under subdivision (b).

The precise point was stated with perfect clarity by Judge Alschuler in his dissenting opinion in *O'Brien* v. *United States*, 51 Fed. (2nd) 193, 198:

> "I cannot bring myself to believe that it was the intent of Congress by paragraph (a) to constitute the willful failure (1) to pay, (2) to make return, (3) to keep records, or (4) to supply information, misdemeanors subject to the prescribed penalties, and then by paragraph (b) to make the very same failures, without the remotest additional element, felonies subject to the penalties as therein specified" (p. 198).

Further Judge Alschuler said:

> "Plainly this legislation contemplates that attempt includes something which mere failure or omission

does not. That something in my judgment is some affirmative act. Conduct which is wholly and only an omission as defined in (a) falls short of being an attempt as defined in (b). Thus while there is here present in the indictment and in the proof the willful *omission* of (a), there is entirely wanting the affirmative act to constitute the *attempt* which in my judgment is of the gist of (b). If paragraph (a) made the willful failure to make return a misdemeanor, it is hardly conceivable that Congress intended to make the very same willful failure to make the return a felony" (p. 198).

It was contended by counsel for petitioner in the court below that the logic of this argument is unanswerable and Judge Learned Hand, while finding himself constrained to concur in the affirmance of the judgment, was quoted in the opinion in the case at bar as wishing "it to appear that as a new matter he would decide otherwise, and would reverse this conviction in accordance with the reasoning of Judge Alschuler's dissent in O'Brien v. United States, supra, which appears to him unanswerable."

It may be added that the courts in several instances have declared that the misdemeanors defined in Section 145(a) are different from the felony defined in Section 145(b).

United States v. *Capone*, 93 Fed. (2nd) 840, 841;
O'Brien v. *United States*, 51 Fed. (2nd) 193, 196.

In the *O'Brien* case, supra, the court affirmed a judgment of conviction for both misdemeanors of failing to make a return and the felony of wilfully attempting to defeat and evade the tax. The majority conceded this proposition:

> "The offense of willful failure to file an income tax return is not the same as a willful attempt to evade and defeat an income tax."

If the statute were intended by Congress to embrace such cases as the one at bar clear warning of its intention must be given in the statute itself.

Crooks v. *Harrelson*, 282 U. S. 55, 61;
Crawford on Statutory Construction, Sec. 242, p. 472;
McBoyle v. *United States*, 283 U. S. 25, 27;
United States v. *Merriam*, 263 U. S. 179, 187-188;
Partington v. *Attorney General L. R.*, 4 H. L. 100, 122.

In *Crooks* v. *Harrelson*, 282 U. S. 55, 61, a civil tax case, this court said:

> "Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness."

In *McBoyle* v. *United States*, 283 U. S. 25, 27, the Supreme Court reversed a judgment of conviction and stated the principle applicable and the underlying reason:

> "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair so far as possible the line should be clear."

It is urged that the statute must be construed so as to require for the proof of the felony defined in Section 145(b) more than mere proof of the misdemeanors defined in Section 145(a).

Apparently the sole obstacle to reversal of the conviction in the court below was the decision of the same Circuit Court of Appeals in *United States* v. *Miro*, 60 Fed. (2nd) 58. In that case the court conceded expressly that the mere omission to file a return and pay a tax would not amount to an attempt at common law. But it was argued that for some reason offenses under the Internal Revenue Law were to be treated differently from others. The sole suggested reason of the court for that assumption is that the

Revenue Act created an affirmative duty of reporting the income and paying the tax and that, therefore, this purely negative thing becomes positive and affirmative and the omission becomes something more than a mere omission.

The Revenue Act is not peculiar in creating an "affirmative" duty. The same may be said of any statute which requires anything to be done. In that respect the Revenue Act is like uncounted other statutes. If the meaning of the word "attempt" is to be changed and its common law significance disregarded for any such reason, the change will be universal in its application and cannot be limited to its use in the Revenue Act.

It was also argued in the *Miro* opinion that the use of the words "in any manner" indicates an intention to cover all possible methods of evasion and not to require "specific means" as an "exclusive method of such evasion". It would seem that this subject does not bear any relation to the precise point now under consideration. In the misdemeanor statute Congress was definite and specific, because the omissions could be readily defined in Section 145(a). Congress could find no language that would be comprehensive of all the means and manners of evasion possible to a taxpayer and, therefore, was obliged to use general terms in 145(b). There is no reason for assuming that by these general terms Congress intended to include the specific omissions in Section 145(a), which it had already defined. It may be noted that of the judges who decided the *Miro* case only one participated in the decision of the case at bar.

The word "attempt" implies an act, something positive, not a mere omission.

Burton v. *State*, 62 So. 394, 395, 8 Ala. App. 295.

The word "attempt" means an act intended to effect the crime.

Tharpe v. *State*, 30 S. W. (2nd) 865, 182 Ark. 74, 79;
People v. *Anderson*, 37 P. (2nd) 67;
Hammond v. *State*, 171 S. E. 559, 47 Ga. App. 795;

Alford v. *Commonwealth*, 42 S. W. (2nd) 711, 240 Ky. 513;
State v. *Lourie*, 12 S. W. (2nd) 43;
State v. *Hudson*, 151 A. 562, 103 Vt. 17.

The word "attempt" implies both purpose and effort.

2 *Bishop New Cr. Prac.*, 4th Ed., Sec. 80.

Some act is necessary.

State v. *Thompson*, 118 Kan. 256, 234 P. 980.

United States v. *Quincy*, 31 U. S. 445, 465, 6 Pet. 445, defines the word as follows:

> "To attempt to do an act does not, either in law or in common parlance, imply a completion of the act, or any definite progress toward it. Any effort or endeavor to effect it will satisfy the terms of the law."

The essentials of the felony described in Section 145(b) have never been clearly defined. The language of the statute is not self-definitive. For definition of the word "attempt" resort must be had to the common law. There is no other source from which a definition could be drawn under our law and no other means by which the language used could be interpreted and defined.

It is urged that any construction of the statute, which would give the word "attempt" a different meaning from that uniformly given at common law, would render the statute so uncertain in its meaning and application as to be unconstitutional.

2

In view of the dominant nature of the question of statutory construction heretofore argued it may be unnecessary to discuss at length the other questions presented. However, it is not intended to slight them. The question of peti-

tioner's mental condition bore directly on the wilfulness of his alleged act, assuming that there was any act. There was ample proof as to the mental condition of petitioner and the fact that his condition affected his will power. Physicians who treated him and an expert of unquestionable standing testified that his condition would affect his will power to do things required of him under the income tax law (R. 226-241, 190-205, 358-365). The court below was asked for specific instructions, which would give the jury the tests by which it could determine whether his mental condition precluded wilfulness on his part or had any effect on the alleged wilfulness (R. 394). An exception was taken to the court's failure to instruct the jury as requested (R. 409). The court failed to give the requested instructions or to give any instruction at all upon the subject by which the jury might be guided in testing the effects of petitioner's condition.

CONCLUSION

This cause involves a statute of wide application and increasing importance. Its construction by the court below and by one other circuit has been the subject of serious discussion and criticism. The reasoning of the judges opposed to the construction given the statute in the case at bar has not been successfully refuted. The sound construction based on that reasoning definitely distinguishes between the misdemeanors and the felony defined by Congress in different sections of the statute. In view of this distinction the judgment of conviction should be reversed and the indictment dismissed.

Respectfully submitted,

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